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No. 96-185

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ELPIS SAKARIA *and* JACK AND LILLIAN HILLMAN
Petitioners,

v.

DARE COUNTY BOARD OF EDUCATION
Respondent.

On Petition For Writ of Certiorari To The North Carolina Supreme Court

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

This case raises a serious constitutional question about the division of authority between the Federal Government and the states. May a state court expand by implication a state's eminent domain authority in order to satisfy the condition of a federal permit, when neither state nor federal law expressly authorizes the state to condemn private property for that purpose? Respondent has sought to condemn two lots of Petitioners' property to satisfy the Army Corps of Engineers' demand for wetlands mitigation. *See* Pet. App. 3b. The North Carolina state courts repeatedly upheld a judgment that the school board possesses the authority to condemn Petitioners' property, despite the absence of express authority under North

Carolina law or the Clean Water Act. *See* Pet. App. 8b. This is a matter of considerable constitutional moment. If left uncorrected, it would mean in effect that state courts have the unilateral power to determine the content of federal law, re-casting the division of state and federal authority prescribed by the Constitution.

Respondent fails to diffuse the force of Petitioners' showing. Instead, Respondent advances several procedural arguments to rationalize the Court's declining review. These arguments are erroneous.

1. *Jurisdiction.* Respondent contends on two grounds that this Court has no jurisdiction to review Petitioners' case. First, the school board argues that "[t]he question raised by petitioners does not present a case arising under the Constitution or statutes of the United States." Brief Opp. 7. Second, it attempts to show that "[t]here was no issue of federal law raised or decided by the North Carolina courts." *Id.* On both points, Respondent is confused.

A. Petitioners have asserted jurisdiction under 28 U.S.C. § 1257(a). Pet. App. 1. That statute grants jurisdiction for this Court to review state court decisions in the following circumstances:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the

> Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Distinguished commentators have observed that 28 U.S.C. § 1257 "covers the entire range of federal questions that can arise in a case in a state court." ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 92 (7th ed. 1993). One category of cases over which this Court's jurisdiction is routinely exercised under section 1257(a) is those "which involve the construction and application of the federal Constitution, treaties, or laws." *Id.* at 91. The statute plainly does not restrict this Court's state-court-review jurisdiction to cases where a state court has ruled on the constitutional validity of a federal treaty or statute. Early in our national history the Court established that it has jurisdiction to review and, if necessary, correct the interpretation and application of federal law by state courts. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816) (Story, J.).

This case fits squarely within the contours of section 1257(a). It presents a federal question which arises out of the state court's determination that N.C. Gen. Stat. § 115C-517 authorizes the Dare County School Board to condemn Petitioners' property to obtain land for wetlands mitigation required by a federal wetlands permit. *See* Pet. App. 8b. The school board disagrees with this characterization. It writes, "This case is and was a garden variety question of the interpretation of a state statute by a state court." Brief Opp. 7. If by "garden variety" the school board means that this case has no federal aspect, it is simply mistaken. By seeking to

condemn property to satisfy a federal wetlands permit, the board has made the case *federal*. Congress enacted the law (Section 404 of the Clean Water Act) creating a need for the land that Respondent seeks to condemn, and this Court has a long-established institutional interest in ensuring the uniform interpretation and application of federal law by state courts. Beyond a routine interest in overseeing the construction and application of federal law by state courts, the Court has a substantial interest in preventing state courts from blurring the constitutional division of federal and state authority. In short, this case fairly presents a substantial federal question reviewable by the Court.

B. Respondent further contends that Petitioners failed to raise their federal question below, as required by 28 U.S.C. § 1257(a).

> Petitioners' question presented for review was never decided, briefed, presented, noted, nor probably even thought of by any of the three North Carolina courts that considered this case or by either party heretofore.

Brief Opp. 6. Again, Respondent is mistaken. To determine whether a federal question has been adequately raised "it is relevant and usually sufficient to ask whether petitioners satisfied the state rules governing presentation of issues." *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 334 (1968) (Harlan, J., dissenting). Petitioners timely raised their federal question before the North Carolina Supreme Court. In their notice of appeal they described the constitutional question arising from the judgment of the court

of appeals, which they urged on the state supreme court as justification for the exercise of its appellate jurisdiction.

> The said judgment directly involves a substantial question arising under the Fifth and Fourteenth Amendments to the Constitution of the United States and under Article 1, Section 19 of the Constitution of the State of North Carolina, in that the judgment deprives defendants of rights secured thereunder to the defendants by overruling defendants' assignments of error as to plaintiff's actions in condemning defendants' land for purposes not authorized by law, without observing the prerequisites required by law, and otherwise acting arbitrarily, capriciously and unfairly, thereby depriving defendants of their constitutional rights to due process. This constitutional issue was timely raised in the trial tribunal in defendants' answers and at trial (R, pp. 37-46, 58-59, 65-66). This constitutional issue was determined erroneously by the Court of Appeals.

Notice of Appeal at 2. The North Carolina Supreme Court retained the appeal, Pet. App. 2g, and *denied the school board's motion to dismiss the appeal for lack of a substantial constitutional question*. Pet. App. 1h. North Carolina's highest court therefore had three opportunities to rule that the landowners' constitutional question had been untimely or was otherwise defective under state law: when evaluating the notice of appeal, when deciding whether to grant the board's motion to dismiss, and when ultimately affirming the lower court judgment. Instead, the state supreme court treated Petitioners' constitutional question as not only timely but substantial. The record below thus reflects conformance to "state rules governing presentation of issues," *Amalgamated*

Food Employees Union v. Logan Valley Plaza, 391 U.S. 308, 334 (1968) (Harlan, J., dissenting), and ensures that Petitioners' constitutional question meets the test of having been adequately raised in state court.

It is well-established that the question presented in a petition for writ of *certiorari* need not frame the issue in precisely the same terms as the question was presented to the lower courts. *See, e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 n.9 (1982). The focus of Petitioners' constitutional concern has consistently been the state court judgment authorizing the school board to condemn their land "for purposes not authorized by law." Notice of Appeal at 2. Whether concerns with such authorization are expressed broadly in terms of due process or more narrowly in terms of the structural limitations established by Article I and the Tenth Amendment makes no difference for this Court's jurisdiction—particularly when Petitioners have no alternative theory on which jurisdiction might be based. For this reason, Respondent's reliance on *Yee v. City of Escondido*, 503 U.S. 519, 532-33 (1992), Brief Opp. 7, is misplaced.

In sum, Respondent's jurisdictional objections are ill-founded. This case presents a substantial federal question that was properly raised in the courts below.

2. *Standing*. Respondent also attempts to cast doubt on Petitioners' standing to press their claims before this Court. "Actually and practically there is no existing case or controversy." Brief Opp. 11. On the contrary, the controversy could not be more lively.

This Court summarized the requirements of standing in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992):

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical' . . . ." Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." . . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. at 560-61 (citations omitted). Petitioners satisfy each of these elements. They have lost their property in a condemnation action. A more tangible "invasion of a legally protected interest," *id.* at 560, is difficult to imagine. This loss is plainly "concrete and particularized," *id.*, because it affects them in a deeply personal way. *Id.* at 561 n.1. It is also actual and not hypothetical: the loss has occurred. Moreover, the school board and not some third party caused the loss of property that lies at the root of the question presented in this case. Finally, a favorable decision by this Court will redress Petitioners' loss of property by denying the school board the authority to condemn their land for Federal wetlands mitigation. This will return two of the six parcels of land, and without these lots for mitigation the school board will lose its Section 404 permit and the authority under North Carolina

law to condemn any of the six lots originally belonging to the landowners. *See* Pet. App. 3b; N.C. Gen. Stat. § 115C-517. The return of Petitioners' land is thus the necessary and sufficient condition for a legal remedy in this case. In short, the existence of Petitioners' standing is beyond cavil.

The school board also argues that Petitioners' case is mooted by their receipt of compensation for their land. Brief Opp. 7, 10. This is incorrect. The landowners did not receive this compensation as a settlement of their claims against the board. They received it as a consequence of a jury trial on the issue of just compensation. Following that trial the North Carolina Superior Court ordered the board to pay the judgement amount plus costs and interest to the landowners. These proceeds have been frozen in an interest-bearing savings account pending the Court's disposition in this case. If the Court resolves the case in Petitioners' favor, they will simply return their share of the proceeds plus interest. The logistics of that matter, however, have nothing to do with whether the issue raised by this case is moot. That state of affairs would only obtain if the determination Petitioners seek could not have any practical effect on the existing controversy. That is manifestly not the case here. Accordingly, Respondent's mootness argument fails.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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